SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 399

ROBERT E. HANNEGAN, as Postmaster General of the United States,

Petitioner,

vs.

ESQUIRE, INC.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE

American Newspaper Publishers Association,
as Amicus Curiae,
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The American Newspaper Publishers Association submits this brief as Amicus Curiae in the above entitled cause in support of respondent's position.

Statement of the Case

In the interest of brevity the Amicus Curiae relies upon the statement of the case as set forth in the brief of respondent herein.

Interest of the Amicus Curiae

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and or Sunday newspapers. This membership embraces more than 700 newspaper publishers whose publications represent in excess of eighty per cent of the total daily and Sunday circulation of newspapers published in this country and all of which mail their publications at the second class mailing rates under the conditions prescribed therefor in the statute.

The Association is vitally interested in a clarification by this Court of the fundamental issue in this case, namely, the right of the Postmaster General to exclude from the second class mailing privilege any publication, which, in his opinion, does not make a "special contribution to the public welfare." By this arbitrary action the Postmaster General has constituted himself the censor of all publications which go through the mails at the second class mailing rate.

Argument

Point I. The Court of Appeals correctly held that the Postmaster General had exceeded his authority and had constituted himself a censor in determining that Esquire Magazine was not entitled to the second class mailing privilege.

The statute involved in this controversy (20 Stat. 359, 39 U. S. C. 226) provides:

> "Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: * * * Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to litera-

ture, the sciences, art, or some special industry, and having a legitimate list of subscribers * * *."

At the hearing on the right of Esquire to continue to enjoy the second class mailing privilege it was charged that the right should be revoked because Esquire failed to meet the Fourth condition. Counsel for Esquire introduced expert testimony on the contents of the magazine which showed that it meets the reasonable requirements of this statute.

The majority of the Hearing Board specifically found that the publication had not failed to comply with the Fourth condition (R. 1839).

Yet Postmaster General Walker revoked the second class privilege on the ground that the magazine did not comply with the Fourth condition because it did not make a "special contribution to the public welfare" (R. 1863).

In so holding, the Postmaster General, in effect, wrote another condition into the statute. It has been specifically held that he cannot do this. In *Payne* v. *Railway Publishing Co.*, 20 App. D. C. 581, writ of error dismissed 192 U. S. 602 (1904), the court held that the Postmaster General could not add the requirement "current news" to the enjoyment of the second class mailing privilege because it is not competent for him to add anything to the statute or to take anything away from it.

In issuing the Esquire order Postmaster General Walker indicated that he took this action because he felt that it was contrary to public interest to allow this publication to enjoy the second class mailing privilege. The court in the case cited above pointed out that "it is not the province of the Postmaster General to remedy the evil, if evil there is, by a postal regulation, or by unwarranted interpretation of the law" (20 App. D. C. at pages 597-598).

It is obvious that the District Court upheld the order of the Postmaster General because it too felt that this action was in the public interest. However, it is no more the province of the courts than it is of the Postmaster General to establish the standards it feels a publication should meet in order to enjoy the second class mailing privilege. Congress, and Congress alone, has the authority to establish the requirements of the second class mailing entry.

Moreover, as the Court of Appeals pointed out, public interest would not be served by permitting the Postmaster General to issue such orders. Postmaster General Walker by his order in this case established himself as the censor of publications which meet the statutory requirements for the second class mailing privilege. This privilege is an important factor in the ability of a publication to compete with publications of a similar character. Under the order herein, a publication may be singled out and deprived of its second class mailing entry not because it is unmailable, but because, in the opinion of the Postmaster General, it does not make a "special contribution to the public welfare". His order constitutes a threat to all publications using the mails because, if upheld by the courts, it subjects their editorial policies to the approval of the Postmaster General. As the Court of Appeals said, "It is inconceivable that Congress intended to delegate such powers to an administrative official or that the exercise of such power, if delegated, could be held constitutional."

The inherent danger in granting the Postmaster General such power is obvious.

There are over 25,000 newspapers and magazines now admitted to the second class mailing privilege. No one man, no one group of men controls the policies of any large proportionate number of them, whether newspapers in the weekly, semi-weekly, tri-weekly, daily or daily and Sun-

day fields, or whether magazines published weekly, monthly, quarterly or occasionally. In their editorial columns they represent every shade of opinion. In their news or information columns they bring to the people of this country information from every source in the world. The same is true of their entertainment sections. In fact, the publications of this country are as varied as the American scene itself.

The Court of Appeals gave examples to "illustrate the intellectual standards required for the kind of censorship exercised in this case." If an official is to be granted control over opinion, he should possess special qualifications for this task. Yet the office of the Postmaster General is a peculiarly political one. Since the turn of the century no President has named as Postmaster General any person who did not actively participate in the campaign for the successful nominee. The Postmaster General who issued this order is not an exception. He was long treasurer of the Democratic National Committee and also served as chairman of that Committee. His predecessor as Postmaster General was chairman in 1932 and following the victory in that campaign he was appointed Postmaster General in 1933. He continued to serve in both capacities throughout the 1936 campaign. The present Postmaster General, who has been substituted as petitioner in the present case, was chairman of the Democratic National Committee in the last national campaign and still holds the chairmanship.

While the statute contains no authority for such an assertion of power as had been made by petitioner herein, this Amicus Curiae insists that no public official could be vested with the power to bar a publication from the mails on the ground that in his sole opinion it does not make a "special contribution to the public welfare" and then prevent review of such an order by the courts.

As Madison said of our free press guaranty:

> "* * * the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to law. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also * * *" Report on the Virginia Resolutions, Letters and Other Writings of James Madison, 1865, Vol. IV, p. 543.

Long before the ratification of our First Amendment England had abolished both censorship and licensure of the press. Since the ratification of the First Amendment there has been no reported case until the decision of the District Court in which our courts have upheld the contention of any public official in this country that he has power to exercise a previous restraint upon publications through the exercise of censorship. This Court held such censorship unconstitutional in *Near* v. *Minnesota*, 283 U. S. 697 (1931).

The decision of the Circuit Court of Appeals holding the order invalid because it was not within the authority of the Postmaster General and because it violated the guaranties of the First Amendment should be affirmed.

Point II. The action of the Postmaster General in the present case was arbitrary and capricious.

A review of the facts in this case reveals that the action of the Postmaster General throughout this proceeding has been arbitrary and capricious.

Although hearings began on October 19, 1943, it was not until October 25 that counsel for the Post Office Department made clear its contention that the publication did not comply with the Fourth condition. This was a complete reversal of the position outlined in a letter of October 8

in which counsel for the Department had stated "I shall not contend in the hearing aside from the non-mailable obscenity angle that the publication does not comply with the Fourth condition of the Second-Class Act" (R. 603-604).[1]

The Postmaster General gave respondent the hearing guaranteed it by 31 Stat. 1107, 39 U. S. C. 232. He then overruled and reversed the findings of his self-appointed Hearing Board. Thus, he gave respondent a hearing in form but denied it in substance.

Furthermore, the Postmaster General has reversed his position on the right of the courts to review his action in this case. In his order, he expressed some doubt as to his authority to revoke the privilege in this case and stated "it is for our courts to say what this statute means and what limits and restrictions there are upon the use of the second-class mail privilege" (R. 1861). He postponed the effective date of the order for 60 days "In order to provide the publication ample opportunity to appeal this order to a court of competent jurisdiction to fully review and settle this matter * * *" (R. 1865). Then, in paragraph 32 of his answer to the amended complaint in the District Court, he contended that in determining that the magazine did not meet the Fourth condition he was exercising a judicial or quasi-judicial discretion and that the exercise of his judgment and discretion was not subject to review or control by the courts.

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[1] Were this an issue of obscenity and not one of censorship this Amicus Curiae would not be before this Court. However, the issue of obscenity was disposed of at the hearing and is not relied upon in any sense of the word by the petitioner herein having been expressly stipulated out of the case (R. 1892). Rather, the sole ground upon which petitioner relies is his assertion of the power to censor the press through a previous determination by him that a publication must make a "special contribution to the public welfare" before it can be distributed through the mails at the second class rate.

It is clear that this determination was not made "in good faith and in the exercise of a reasonable discretion" as petitioner contended.

As hereinbefore pointed out the Postmaster General did not make a determination of facts within limits set out by Congress. Rather he exceeded his statutory authority. Therefore, the District Court erred in sustaining the order as "the act of an executive officer charged with the performing of a given duty."

This order was subject to review by the courts. The Court of Appeals correctly set it aside as beyond any statutory authority and as repugnant to the guaranty of a free press embraced in the First Amendment to the Constitution.

Conclusion

WHEREFORE, it is respectfully submitted that this Court should affirm the order of the Court of Appeals setting aside the order in controversy.

Respectfully submitted,

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FILE COPY

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BRIEF OF THE READER'S DIGEST ASSOCIATION, INC., AS AMICUS CURIAE

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BRIEF OF THE READER'S DIGEST ASSOCIATION, INC., AS AMICUS CURIAE

Preliminary Statement

The issue in the present proceeding is whether the Postmaster General, under the Act of March 3, 1879, Section 14 (20 Stat. 359); 39 U. S. C. § 226 may withdraw the second-class entry of "Esquire" magazine on the ground that "Esquire" fails to conform to the fourth condition of Section 14 because, in his opinion, it makes no "special contribution to the public welfare" (Order of the Postmaster General No. 23459, dated December 30, 1943, p. 10). The Postmaster General has stated that, if his interpretation of the statute above referred to is sustained, he will seek to withdraw the second-class mailing rights of other popular magazines (Annual Report of the Postmaster General for the Fiscal Year Ended June 30, 1943, p. 8).

The Reader's Digest Association, Inc. is the owner and publisher of the monthly magazine "The Reader's Digest", which has a large circulation in the United States. Copies of each issue of "The Reader's Digest" are sent to many subscribers throughout the country by mail as second-class matter. A substantial part of each issue of "The Reader's Digest" has been devoted to condensations or digests of literary material which has appeared in other magazines, including "Esquire". Since no objective criterion exists or can be devised for determining what material available for publication would constitute a "special contribution to the public welfare", it is quite probable that "The Reader's Digest" has published and will in the future publish condensations or digests of articles from other magazines which in the opinion of the Postmaster General might fail from time to time to meet the standard he has suggested of constituting a "special contribution to the public welfare".

As a matter of editorial policy, "The Reader's Digest" seeks to present to its subscribers each month a cross-section of well written and interesting literary material on various subject matters currently engaging public interest. In selecting articles from other magazines to be digested and included in its pages, "The Reader's Digest" is solely concerned with the literary merit of the particular article and the relation of its subject matter to current public interest, and not with the general editorial pattern of the magazine from which the material is taken. If, however, the power claimed by the Postmaster General, under his interpretation of the statute, were sustained, it would become a matter of direct concern to "The Reader's Digest" whether the use of any literary material from a magazine which had been deprived by the Postmaster General of second-class entry, might jeopardize the second-class entry of "The Reader's Digest".

By reason of the foregoing, The Reader's Digest Association, Inc. has a vital interest in the outcome of this proceeding, in contesting the asserted right of the Postmaster General to impose additional qualifications or conditions for second-class entry not set forth or contemplated by Section 14 of the Act of March 3, 1879, and in asking this Court to clearly define the limitations upon and the consequences of the exercise by the Postmaster General of such powers as he may be held to possess under that Act.

Pursuant to Rule 27 of the General Rules of this Court, the parties hereto by their counsel have consented to the filing of this brief.

Argument

Summary of Argument

Two basic questions are presented by this case:

A. Did Congress intend to give the Postmaster General the power to determine *on a qualitative basis* what publications should be permitted second-class rates because they disseminated "information of a public character" or were "devoted to literature, the sciences, arts, or some special industry"; and

B. If Congress did so intend, is the fourth condition of Section 14 of the Postal Classification Act of 1879 constitutional.

It is the position of The Reader's Digest Association, Inc. that:

1. The fourth condition of Section 14 is stated in broad generic terms not susceptible to the construction that Congress thereby intended to delegate to the Postmaster General plenary power to set up qualitative standards as to what constitutes public information, literature, the sciences or the arts, and that, if the language used is at all ambiguous, the

legislative history of the Act and its administrative interpretation support this contention.

2. If Congress intended by the fourth condition of Section 14 to classify publications on the basis of quality rather than kind, the Act is unconstitutional as a delegation of power to an executive officer without providing adequate standards for its exercise, and (since such power is that of economic death to a publication without justification under any overriding consideration of the national welfare) as an abridgment of freedom of the press.

I.

Congress did not intend by the fourth condition of Section 14 of the Postal Classification Act of 1879 to give the Postmaster General the power to classify publications on the basis of the quality of their content.

The Postmaster General appears to have derived his conclusion that the condition that a publication "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry" to be entitled to entry as second-class mail means that such publication "is under a positive duty to contribute to the public good and the public welfare" [1] from a misconception of the meaning of the language of this Court in *Milwaukee Publishing Company* v. *Burleson*, 255 U. S. 407 (1920), in which the Court, referring to the second-class mailing privilege, said (p. 410):

> "* * * It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press. * * *"

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[1] Order No. 23459 of the Postmaster General, dated December 30, 1943, R. 1877, 1883.

The fact that the Court spoke of favors to "*publishers*" because of the special contribution to the public welfare believed to be made by the "*press*", a comprehensive term for all publishers, was not noted by the Postmaster General. But obviously the Court did not attribute to Congress the somewhat naive belief that every publication would contribute to the public welfare nor is there any suggestion that the Court believed that Congress intended that only such publications as were affirmatively found to do so should be carried at second-class rates.[2] The language quoted from the *Burleson* case plainly does not support the Postmaster General's position that he has been delegated the power to grant or refuse life to periodicals[3] on the basis of his conception of their value to the public. If such power exists, it must be found in the language of the fourth condition of Section 14.

The words of the fourth condition relied on by the Postmaster General are broad, general terms. Only two qualifying expressions are used. Information must be "of a public character", which means no more than that it must be information of interest to a substantial number of people, a condition which, if not fulfilled by the publisher, will soon result, without the necessity of deliberation by the Postmaster General, in his publication's having no "legitimate"

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[2] Representative Money, member of the House Committee on the Post Office and Post Roads and sponsor of the bill which was later enacted as the Act of March 3, 1879, recognized that some publications which enjoyed the second-class rates were devoted to "gossip and the scandal of the hour" and of little educational value. Congressional Record, Volume VIII, 1879, pages 693, 2135. It is significant that there is no indication whatsoever of any intention to exclude such periodicals from the second-class rates.

[3] The Postmaster General's argument that no question of censorship is involved because "Esquire" can be mailed at third-class rates is without substance. To deprive a periodical of second-class rates deprives it of competitive facilities essential to circulation and hence to freedom of publication. See *Ex parte Jackson*, 96 U. S. 727, 733 (1877).

list of subscribers" and in other respects failing to meet the conditions of Section 14. The qualification of being devoted to "some special industry" was no doubt inserted as an extension of the second-class rates to trade journals and magazines which might be of interest only to specialists in that field,[4] for a publication dealing with the subject of industry as a whole would plainly be publishing "information of a public character" and require no such additional qualifying language.

The word "literature" may have different meanings to different people. Literature in its broad sense constitutes "the written or printed productions of the human mind collectively",[5] but, more narrowly, productions "marked by elevation, vigor, and catholicity of thought, by fitness, purity, and grace of style, and by artistic construction".[6] Only a small part of the mass of writings currently published could possibly be called literature in the narrower sense and only in unusual cases would two people agree as to which of such writings did so qualify.

Similarly "science" in its broad sense is "the sum of universal knowledge",[7] including theology, philosophy, economics, and political science in which conclusions cannot always be verified, but in its narrower sense it may apply only to "knowledge gained by exact observation and correct thinking, especially as methodically formulated and arranged in a rational system."[7]

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[4] Similarly, the second-class rates apply to publications of benevolent and fraternal societies, institutions of learning, trade unions, and professional, literary, historical or scientific societies (Act of Aug. 24, 1912, c. 389, § 1, 37 Stat. 550; 39 U. S. C., § 229).

[5] Funk & Wagnalls New Standard Dictionary of the English Language, 1938, p. 1446.

[6] Funk & Wagnalls New Standard Dictionary of the English Language, 1938, p. 1446.

[7] Funk & Wagnalls New Standard Dictionary of the English Language, 1938, p. 2193.

The debate as to what constitutes "art" is, of course, endless and inconclusive, and the ancient cliché, "I don't know much about art, but I know what I like," is perhaps the fundamental principle of criticism of "art", used in its narrow sense as applicable to certain approved examples of the fine arts. But broadly "art" is "skill in applying knowledge or ability to the accomplishment of a concrete purpose"[8] and embraces not only skilled work in the fine arts (whether or not it meets with the approval of critics) but in the useful, industrial and mechanic arts as well.

It is apparent that if, as we believe, Congress intended the language of the fourth condition to be construed broadly, the entire field of public human expression is covered and the Postmaster General's duties are limited to determining whether the formal objective standards set by the first three conditions are complied with and the relatively simple questions as to whether the publication must be excluded as "designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

It is inconceivable that Congress used the words "literature, the sciences, arts" in a restricted sense with the intention of conferring on the Postmaster General the enormous and insuperably difficult task of determining what constitutes devotion to a narrow but undefined conception of literature, science or art with no better standard than his idea of what is good for the public, which is, in the last analysis, simply that of the art critic who knows what he likes.

If Congress did intend a departure of such magnitude from its previous practice, it would surely have stated its intention plainly and the debates in Congress and committee reports would contain some reference to it.

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[8] Funk & Wagnalls New Standard Dictionary of the English Language, 1938, p. 159.

Legislative history of the fourth condition of Section 14 of the Postal Classification Act of 1879

The plain language of the statutes enacted prior to the Act of March 3, 1879 shows that Congress intended to grant low rates to all periodicals which could bring themselves within a class determined by objective standards.

Section 22 of the Act of February 20, 1792 (1 Stat. 238) provided the lower rates for "all newspapers". Section 22 of the Act of May 8, 1794 (1 Stat. 362) included in the lower rates "magazines and pamphlets". Section 20 of the Act of March 3, 1863 (12 Stat. 705) provided: "The second class embraces all mailable matter exclusively in print, and regularly issued at stated periods, without addition by writing, mark or sign." Revised Statutes (1878), Section 3877, provided: "Mailable matter of the second class shall embrace all matter exclusively in print, and regularly issued at stated periods from a known office of publication, without addition by writing, mark, or sign."

The following statement made on the floor of the House by Representative Money, sponsor of the bill, shows that Section 14 of the Act of March 3, 1879 did not add to the Postmaster General's powers:[9]

> "I now, Mr. Speaker, address myself to the bill under consideration, * * *.
>
> "This is nothing but a simplification of the postal code. *There are no new powers granted to the Department by this bill, none whatever.* The only feature which has met with any considerable opposition in the bill is one requiring registration for public

[9] Section 17 of the bill then being considered by the House contained the identical language which was later enacted as the fourth condition of Section 14 of the Act of March 3, 1879. Congressional Record, Vol. VIII, 1879, p. 2136.

journals. * * * In regard to that matter, there is no additional grant of power to any postmaster or to the Post-Office Department by this section." [10] (Italics supplied).

In the first part of the foregoing statement Mr. Money obviously referred to the bill *as a whole*.

The registration provisions of the bill were opposed on the ground that they might be the inception of a censorship of the press (Congressional Record, Vol. VIII, 1879, p. 2137) and were deleted from the bill (*id.*, pp. 2137, 2138). The elimination of these purely administrative provisions in order to safeguard against censorship is inconsistent with the claim of the Postmaster General that other provisions of the bill then under consideration granted to him practically unlimited power to deny to periodicals, which in his opinion did not contribute to the public welfare, facilities essential to circulation and hence to freedom of publication. See *Ex parte Jackson*, 96 U. S. 727, 733 (1877).

Administrative history of the fourth condition of Section 14 of the Postal Classification Act of 1879

For more than 63 years and until the institution of the present proceeding no Postmaster General has asserted the claim that he is called upon to judge publications which apply for second-class entry upon the basis of the quality of their content. This alone, while not conclusive, is quite persuasive that no such power or duty exists. During this period, in 1906 and again in 1911, Congress authorized the appointment of two Commissions to examine the subject of second-class mail.

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[10] Congressional Record, Vol. VIII, 1879, p. 2134.

The first Commission reported[11] that there was "practically no form of expression of the human mind that can not be brought within the scope of" the language of the fourth condition and that the statute "defines not by qualities but by purposes, and the purpose described is so broad as to include everything and exclude nothing".

The second Commission concluded that:

> " * * * the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational values. To attempt to do so would be to set up a censorship of the press. Of necessity the words of the statute—'devoted to literature, the sciences, arts, or some special industry'—must have a broad interpretation.[12]

Faced with the administrative interpretation of the Post Office Department and the conclusions of its Commissions, Congress has taken no action. Its failure to do so over such a long period is strong proof that the Postmaster General was never intended to have the power he has so belatedly attempted to grasp.

The fourth condition of Section 14 of the Postal Classification Act of 1879 must be construed in relation to other provisions of the laws relating to the Postal Service.

Section 14 of the Postal Classification Act of 1879, including the fourth condition thereof, forms an integral part of legislation relating to the Postal Service. An examination of this legislation shows that, except where matter is made nonmailable, it provides objective tests for the Postmaster General to apply in classifying mailable matter and does not anywhere authorize him to accept or reject a pub-

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[11] House Document No. 608, Postal Commission, 1906-07, 59th Cong., 2d Sess., pp. xxxvi-xxxvii.

[12] House Document No. 559, Postal Commission, 1911-12, 62d Cong., 2d Sess., p. 142.

lication which meets such tests because of his subjective conclusions on the quality of its content.

Thus the Postal Laws make a clear division between "mailable" and "nonmailable" matter and divide the former into four general classes to which different rates are applicable. The four classes are generally described as "First, written matter; Second, periodical publications; Third, miscellaneous printed matter * * *; Fourth, merchandise and other mailable matter weighing not less than eight ounces * * *." (Act of Mar. 3, 1879, c. 180, § 7, 20 Stat. 358; Act of Feb. 28, 1925, c. 368, §§ 206, 207, 43 Stat. 1067; 39 U. S. C., § 221).

Having established the general categories of mailable matter, the specific classes are described with more particularity but always in concrete, objective terms.

The first class embraces "letters, postal cards, and all matters wholly or partly in writing", except as otherwise provided. (Act of Mar. 3, 1879, c. 180, § 8, 20 Stat. 358; 39 U. S. C., § 222).

Embraced by the second class are "all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions * * *" of Sections 12 and 14. (Act of Mar. 3, 1879, c. 180, § 10, 20 Stat. 359; 39 U. S. C., § 224). Section 12 provides for the examination of second-class matter and the payment of a higher rate of postage for any matter inserted therein which belongs in a different class. (Act of Mar. 3, 1879, c. 180, § 12, 20 Stat. 359; 39 U. S. C., § 225). The conditions of Section 14 contain requirements with respect to regularity and periodicity of issuance, bearing a date of issue and numbering of issues; issuance from a known office of publication; format of the periodical; and the existence of a public who have subscribed for the periodical at more than a nominal rate. (Act of Mar. 3, 1879, c. 180, § 14, 20 Stat. 359; Act of June 11, 1934, c.

443, 48 Stat. 928; 39 U. S. C., § 226). The determination as to whether a publication meets these requirements involves purely factual questions capable of ascertainment without resort to the ill-defined realm of personal opinion.[13]

It is submitted that the language of the Fourth condition of Section 14, if given its natural meaning as a broad statement of the purposes for which periodicals entitled to second-class rates are published, is in harmony with the other sections of the Postal Law relating to classification and with the objectively ascertainable classification standards they provide. If, on the other hand, this language must be construed as conditioning second-class entry on fulfilling certain undefined and undefinable standards of quality of content, it is a startling departure from the approach and philosophy of Congress as shown in the surrounding context and the other sections of the laws relating to the Postal Service.

When Congress has chosen to give the Postmaster General initial power to determine what may or may not be carried in the mail, it has been in relation to such matters as obscenity, libel, sedition and fraud in which overriding considerations of the public welfare justify some interference with freedom of speech and of the press. The delegation of power in such cases is for the purpose of preventing a definite harm to the public and not for that of selecting, among a mass of material of varying degrees of merit, such reading matter as is deemed to be for the public good. In each such case the power has been given clearly and unambiguously and the area within which it may be exercised has

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[13] The standards for entry as third-class matter (Act of Feb. 28, 1925, c. 368, § 206(a), 43 Stat. 1067; Act of April 27, 1937, c. 141, 50 Stat. 119; 39 U. S. C., § 235) and fourth-class matter (R. S., § 3879, Act of June 8, 1896, c. 370, 29 Stat. 262; Act of Aug. 24, 1912, c. 389, § 8, 37 Stat. 557; Act of Feb. 28, 1925, c. 368, § 207(a), 43 Stat. 1067; 39 U. S. C., § 240) are similarly simple and objective

been sharply defined and restricted.[14] It is impossible to believe that Congress inserted the fourth condition of Section 14 in a statute providing objectively ascertainable classifications for mailable matter with the intention of granting the Postmaster General unlimited personal power to dictate the current reading matter of the people.

II.

If Congress intended by the fourth condition of Section 14 of the Postal Classification Act of 1879 to classify publications on the basis of quality rather than kind, the Act is unconstitutional as a delegation of power to an executive officer without providing adequate standards for its exercise and as an abridgment of freedom of the press.

From what has been said under Point I, it is manifest that, if the language of the fourth condition of Section 14 is to be construed narrowly so as to restrict entry in the second class to such periodical publications as conform to a standard based on quality of content, no such standard has been defined by Congress and, because of the nature of the subject matter, no reasonably definite and precise standard can be established.

Obviously a standard consisting of the uncontrolled mental conclusions of one official[15] as to what in the realm

[14] For example see Act of Mar. 4, 1909, c. 321, § 211, 35 Stat. 1129 as amended, 18 U. S. C. § 334 (obscenity); Act of Mar. 4, 1909, c. 321, § 212, as amended, 35 Stat. 1129, 18 U. S. C., § 335 (libel); Act of Mar. 4, 1909, c. 321, § 215, 35 Stat. 1130, 18 U. S. C., § 338, Act of Mar. 2, 1889, c. 393, § 4, 25 Stat. 874, 39 U. S. C., § 256 (fraud); Act of June 15, 1917, c. 30, Title XII, §§ 1-3, 40 Stat. 230, 18 U. S. C., §§ 343-345 (sedition).

[15] It is to be noted that in the present case the Postmaster General reversed the decision of his own Hearing Board (R. 1856-65).

of public information, literature, art and science contributes to the public welfare is no standard at all, but an attempt by Congress to delegate a power it did not itself have, a power which no one could exercise wisely since no one is wise enough to do so. In the hands of the wisest it would constitute an enlightened tyranny over the press; in less scrupulous hands it would become a medium for arbitrary and capricious suppression of freedom of speech and for channeling public thought to reach political ends.

Suppose a Postmaster General held that detective story magazines made no "special contribution to the public welfare". He might sincerely hold that opinion. Yet as a matter of common knowledge highly regarded justices of this Court are sometimes seen riding a train during recess time, deeply immersed in detective stories as a welcome relief from too close attention to legal tomes during a session of the Court. Practically, only the American reading public has a right to determine (subject to the established exceptions as to obscenity, libel, sedition and fraud) what types of reading matter contribute to the public welfare.

Even if Congress itself had the right to make such determination, it could not delegate it without providing standards for its exercise. *Yakus* v. *United States*, 321 U. S. 414 (1944); *Bowles* v. *Willingham*, 321 U. S. 503 (1944). Since no such right exists, the attempt to exercise it would be an abridgment of freedom of the press[18] and void under the First Amendment to the Constitution. In the words of Mr.

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[18] A periodical cannot exist competitively without second-class entry. Loss of second-class entry is loss of freedom of circulation which is encompassed within the constitutional guarantee of freedom of the press. *Ex parte Jackson*, 96 U. S. 727, 733 (1877); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Lovell* v. *Griffin*, 303 U. S. 444 (1938).

Justice Jackson in his concurring opinion in *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945):

> "But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. * * * "

Conclusion

Sir Congress did not intend by the fourth condition of Section 14 of the Postal Classification Act of 1879 to set up the Postmaster General as guardian of the Nation's thought with power to decree that the public should read in the periodical press only what he found suitable for its welfare, and, since, if any such intent is imputed to Congress, the Act is an unconstitutional attempt to delegate power without providing sufficient standards and an abridgment of freedom of speech and of the press in violation of the First Amendment to the Constitution, it is respectfully submitted that the decision of the Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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